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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 05 2010

SRC 08 800 02350

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

This petition, filed on November 6, 2007, seeks to classify the petitioner pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner argues that his work is "highly influential" and "far superior" to that of his peers with the same educational degree. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.--
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner asserts that he is an alien of exceptional ability. This issue is moot, however, because the director found that the petitioner qualifies as a member of the professions holding an advanced degree. The record reflects that the petitioner received his Doctor of Philosophy degree in Mechanical Engineering from Pukyong National University in Korea in 1998. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "*NYSDOT*"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Part 6, "Basic information about the proposed employment," of the Immigrant Petition for Alien Worker, Form I-140, lists the petitioner's job title as "Mechanical Engineer" and the nontechnical description of his job as "Industrial Safety and Health Specialist." Further, the petitioner's

November 5, 2007 letter accompanying the petition identifies the position sought by him as "Mechanical Engineer, Industrial Safety Specialist." The petitioner states:

> The expertise [the petitioner] possesses in Industrial Safety will substantially benefit the United States on improving industrial work environment and saving thousands of U.S. workers. His presence will significantly advance the most needing area of industrial safety.
>
> * * *
>
> [T]he alien's area of proposed employment is area of substantial intrinsic merit by improving methods of industrial safety and health that may offer tremendous opportunities to enhance the quality of life for Americans [sic] workers and also help to reduce healthcare costs.

With regard to the first factor set forth in *NYSDOT*, we find that the petitioner works in an area of intrinsic merit, industrial safety engineering. Regarding the second factor in *NYSDOT*, whether the proposed benefit of the petitioner's work will be national in scope, the director's decision stated:

> The alien's work could potentially have national impact; however, the [petitioner] did not indicate where he would be employed as an industrial safety engineer. It is unclear whether employment would be a local business as a safety engineer and will be contributing solely to the safety of the business or will be developing safety procedure [sic] and equipment which will be disseminated throughout the nation. He has, therefore, not demonstrated that his work will be national in scope.

On appeal, the petitioner states:

> It is alien's sole intention to protect workers in America. The scholarly knowledge learned, field experience accumulated over last 20 years in international community will be used in America including risk assessment, risk elimination engineering, etc. to prevent and protect American workers.
>
> * * *
>
> In political or government level, since he established industrial safety provisions worldwide this will also serve U.S. governmental agencies such as Department of Labor or Occupational Safety & Health Administration to enact new rules to prevent industrial risks.

The record, however, does not include any letters originating from officials at the U.S. Department of Labor or the Occupational Safety & Health Administration expressing an interest in utilizing the petitioner's services to develop "new rules to prevent industrial risks." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the petitioner's appellate submission does not address the director's finding that the petitioner has not specified

where he will be working in the United States as an industrial safety engineer. In this case, there is no evidence showing that the petitioner has a track record of influencing U.S. industrial safety policies or that the Korean standards in which he has experience are directly applicable to U.S. standards. Accordingly, we affirm the director's finding that the petitioner has not established that benefit he will impart to the United States would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Along with copies of his research articles and information about occupational injuries and fatalities, the petitioner initially submitted two recommendation letters.

[redacted] of Mechanical Engineering, Pukyong National University, states:

> [The petitioner] . . . received his . . . Doctor of Mechanical Engineering from National Pukyong University in Korea.
>
> * * *
>
> [The petitioner] is a highly intelligent, dedicated, and extraordinarily competent safety expert. He has played a major role in research, development and dissemination of occupational accident prevention techniques and has already made significant contributions to the field. Having a broad range of expertise in matters concerning occupational safety, [the petitioner] has also authored a number of articles on safety and disaster planning in prestigious journals. An area of special interest for [the petitioner] is active control of vibration to prevent major industrial accidents. In addition to his professional activity, [the petitioner] has taught occupational and industrial safety at college, as well as being a guest lecturer at various professional conferences.

[redacted] does not provide specific examples of how the petitioner's occupational accident prevention techniques have impacted the field as a whole. With regard to the petitioner's occupational safety expertise, professional activities, and teaching experience, objective qualifications necessary for the performance of an occupation can be articulated in an application for alien employment certification. *Id.* at 220-21.

[redacted] further states:

> Since 1989, [the petitioner] has been working as a safety engineer at [redacted] In this role, [the petitioner's] work has focused on diagnosing and inspecting facilities and equipments including chemical plants and shipbuilding yards, developing and distributing the technical criteria for safety and health, and promoting safety awareness by developing a variety of educational programs pertinent to occupational safety. [The petitioner] also played a major role in developing the Process Safety Management System. The Process Safety Management System is a mandatory system demanding workplaces operating hazardous and harmful facilities to submit the process safety reports.
>
> [The petitioner] has also been conducting significant original research on industrial accidents prevention. For instance, he has been conducting research on active control of vibration. By offering unique ways of expanding our knowledge of active control vibration, [the petitioner] has made a significant contribution to the field. Indeed, his lengthy list of strong research achievements solidifies [the petitioner] as a noted international expert in the field of occupational safety. [The petitioner's] achievements in his area are particularly relevant with respect to advancing the national interest. At a time of rising manufacturing costs due to workplace accidents, there is a tremendous demand within the United States for more targeted accident prevention techniques. But such advances require greater understanding of seemingly inscrutable physical processes. Individuals such as [the petitioner] who has shown great resourcefulness in targeting and improving information about existing successful research are therefore in great demand.

[redacted] does not provide specific examples of how the petitioner's vibration control research has significantly advanced the field of occupational safety. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process. *Id.* at 221.

[redacted] continues:

> [The petitioner's] contributions to the field of occupational safety have been published in a number of original scholarly research articles in peer-reviewed journals with international circulation. The high scientific quality of his research methodology is further demonstrated by the rigorous peer-review process that these journal articles have undergone to qualify for publications. His articles have appeared in such well known journals as *the Journal of*

Korean Institute of Industrial Safety, the Journal of Korea Environmental Sciences Facility and the Journal of Ocean Engineering and Technology. In my opinion, these publications are significant journals with international reputations and circulation. The inclusion of articles for publication in these journals is evidence, in its own right, of the significant nature of the research, and its practical implications.

While the petitioner's published and presented research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication, presentation, or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. In this case, the record does not establish that the petitioner's research findings represent significant advances in the occupational safety field.

[redacted] of the College of Engineering, Seoul National University of Technology, Korea, states:

I first became acquainted with [the petitioner] in 1991 when I began to serve as a member on the advisory board at Korea Occupational Safety and Health Agency.

* * *

[The petitioner] began his safety career with Korea Occupational Safety and Health Agency in 1989 after serving as a [redacted] Throughout his career with Korea Occupational Safety and Health Agency, he has continually made significant contributions to the development of safety policies and programs, most notably in the areas of diagnosing and inspecting facilities and equipments including chemical plants and shipbuilding yards. [The petitioner] also played a major role in developing the Process Safety Management System, which is a mandatory system demanding workplaces operating hazardous and harmful facilities to submit the process safety reports.

[redacted] does not provide specific information regarding the petitioner's level of contribution to the Process Safety Management System or how this system has influenced U.S. occupational safety policies. Moreover, while the petitioner submitted a "Certificate of Employment" from the Korea Occupational Safety and Health Agency, the record does not include a letter of support from the agency discussing the petitioner's role in developing its Process Safety Management System.

[redacted] further states:

[The petitioner] has also distinguished himself as a superb researcher, working in his profession almost two decades. His research career has resulted in the publication of a number of articles in refereed journals, chapters in two books, which have become definitive

> sources with respect to occupational safety and health. Most notable among his research achievements is his work with active control of vibration.

There is no supporting evidence showing that the petitioner's two books "have become definitive sources with respect to occupational safety and health." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). With regard to the petitioner's authorship of "articles in refereed journals," citations offer an objective way of measuring the extent to which one researcher's work has influenced the work of others in the field. For example, numerous independent citations for an article authored by the petitioner would provide solid evidence that other researchers have been influenced by his work. On the other hand, few or no citations of an article authored by the petitioner may indicate that his work has gone largely unnoticed by his field. In this case, there are no citation records or other evidence demonstrating that his published work has significantly influenced his field as a whole or otherwise sets him apart from other researchers in the occupational safety field.

[redacted] continues:

> The problem in the occupational health and safety is a continuous shortage of effective safety Professionals. Especially, there is a great demand for an effective safety Professional with a blend of academic and professional experience like [the petitioner]. Therefore, [the petitioner's] immigration to the United States will serve the national interest of the United States.

A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 221. When discussing claims that the beneficiary in that case possessed specialized design techniques, the AAO asserted that such expertise:

> would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. [The] assertion of a labor shortage, therefore, should be tested through the labor certification process. . . . The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

Id. at 220-221.

The director requested further evidence that the petitioner had met the guidelines published in *NYSDOT*. In response, the petitioner resubmitted copies of his research articles and information about occupational injuries, illnesses, and fatalities. While information showing the general importance of workplace safety may establish the intrinsic merit of petitioner's work, this documentation is not sufficient to show that an individual worker in his field qualifies for a waiver of the job offer requirement. *Id.* at 217.

The petitioner also submitted a December 31, 2008 letter from the Korea Occupational Safety and Health Agency stating that he had "worked as [redacted] which was held in Seoul, Republic of Korea, from June 29 to July 2, 2008." The record, however, does not provide specific examples of how the petitioner's work as "Director of the event team" had a significant impact on his field as a whole.

The petitioner's response included a December 23, 2009 letter inviting the petitioner to serve on the "Steering Committee for the 5th Edition of the ILO [International Labor Office] Encyclopedia of Occupational Heal and Safety." This invitation post-dates the petition's November 6, 2007 filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Accordingly, the AAO will not consider this evidence in this proceeding.

The petitioner also submitted a March 17, 2009 letter from [redacted], stating:

> I am familiar with [the petitioner's] qualifications as a result of my position as Team Leader, Human Factors and Ergonomics Research Team, Organizational Science and Human Factors Branch, Division of Applied Research and Technology, National Institute for Occupational [redacted]
>
> *However, I am writing this letter of recommendation as a private citizen. In no way should the comments provided by myself be construed as an official position or recommendation from any agency of the Government of the United States of America.* [Emphasis added.]
>
> [The petitioner] has worked for the Korea Occupational Safety and Health Agency (KOSHA) since 1989 where he has held a number of positions, most currently that of [redacted] recently held in Seoul, Korea. [The petitioner] is an expert in Process Safety Management and the Occupational Health and Safety Management systems in which corporations establish policies, guidelines and recommendations to improve safety in the workplace. While at KOSHA [the petitioner] has written 6 Codes addressing safety and machinery topics.
>
> [The petitioner] received his doctorate in Mechanical Engineering from Pukyung National University in Korea in 1998 and completed post-doctoral training at the University of Adelaide, Australia in 2001 on the topic of active control of vibration and noise. This assignment was supported by the Korea Science and Engineering Foundation. [The petitioner] is a certified Professional Engineer (PE) in Korea specializing in mechanical safety issues. He is an Honorary Researcher at the Institute for Industrial Safety. He serves on the Evaluation and Planning Committee of the Korea Institute of Industrial Technology, a state-of-the-art technology think tank. [The petitioner] has authored 9 peer-reviewed journal articles, 4 papers in the published proceedings of international conferences and 7 papers in the proceedings of domestic conferences. [The petitioner] has co-authored 2 books on safety topics.

The letter from [redacted] states that his comments should not "be construed as an official position or recommendation from any agency of the Government of the United States of America." [redacted] does not provide specific examples of how the petitioner's work has significantly influenced his field as a whole or otherwise sets him apart from other researchers in the occupational safety field. In this case, there is no evidence showing that the petitioner has a track record of influencing U.S. industrial safety policies or that the Korean standards in which he has experience are directly applicable to U.S. standards.

[redacted]'s letter further states that the petitioner was "offered a Visiting Researcher position with NIOSH in the [F]all of 2008," but that the petitioner "was unable to accept the position due to personal reasons." We note that the unaccepted Fall 2008 job offer post-dates the filing of the petition. As previously discussed, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO will not consider the unaccepted job offer in this proceeding.

The director denied the petition stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director's decision noted that the petitioner had not submitted citation records showing that his work had "a nationally significant impact." The director concluded that the petitioner had failed to demonstrate that his "past accomplishments set him significantly above his peers such that a national interest waiver would be warranted."

On appeal, the petitioner repeats earlier information regarding the importance of his occupation. A petitioner, however, cannot establish qualification for a national interest waiver based solely on the importance of his occupation. *Id.* at 217. The petitioner also recounts his education and experience in the field of industrial safety. As discussed previously, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. *Id.* at 221.

The petitioner also asserts that the petition should not be denied solely based on his citation record. We note that citations are not the only means by which to show the petitioner's impact on his field. Independent witness letters can play a significant role in this respect. In that regard, the petitioner claims that letters from [redacted] and [redacted] constitute "Independent Opinion" letters. The deficiencies regarding these letters have already been discussed. For example [redacted]'s letter failed to provide specific examples of the petitioner's influence on the occupational safety field. Moreover, [redacted] letter states that he serves "as a member on the advisory board at Korea Occupational Safety and Health Agency." Therefore, based on [redacted] affiliation with the petitioner's immediate employer, it is not apparent that [redacted] observations constitute an "Independent Opinion." Regardless, even if we were to accept that the preceding individuals are independent witnesses, the content of their letters collectively fails to establish the depth or extent of the petitioner's influence on the field as whole.

With further regard to the recommendation letters, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec.

791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from individuals selected by the petitioner is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). In this case, the content of the recommendation letters submitted by the petitioner does not establish that his work has significantly impacted his field or that his methodologies have been applied by institutions in the United States.

In this matter, the petitioner has failed to submit sufficient evidence of any type that demonstrates his influence in the field as a whole. Accordingly, the petitioner has not established that his past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. We note that the national interest waiver contemplates that the petitioner's influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.")

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given occupation, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.